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IN THE

Supreme Court of the United States

October Term, A. D. 1931

No. 79

CHICAGO & EASTERN ILLINOIS R. R. CO.,

Petitioner,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS and JOE THOMAS,

Respondents.

PETITION FOR REHEARING ON BEHALF OF PETITIONER CHICAGO & EASTERN ILLINOIS R. R. CO.

EDWARD W. RAWLINS,
Counsel for Petitioner.

T. P. LITTLEPAGE,
Of Counsel.

(35,881)

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TABLE OF CASES.

	PAGE
C. B. & Q. R. R. Co. v. Harrington, 241 U. S. 177	6
Erie R. R. Co. v. Collins, 253 U. S. 77	2
Erie R. R. Co. v. Szary, 253 U. S. 86	2
Kinzell v. Chicago, M. & St. P. R. Co., 250 U. S. 130	3
New York Central R. Co. v. Porter, 249 U. S. 168	3
Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146	2
So. Pac. v. Industrial Accident Commission, 251 U. S. 259	4

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Comes now the above named petitioner, Chicago & Eastern Illinois R. R. Co., and presents this, its petition for a rehearing in this cause, said cause having been affirmed by this Honorable Court on January 4, 1932, and in support thereof respectfully shows the following reasons for granting a rehearing.

I.

In arriving at its decision in this case and in specifically overruling its former decisions in the Collins and Szary cases, we think this Court has overlooked the fact that in this particular class of cases it is the character of the instrumentality upon which an employee is working which is decisive in determining whether or not he was engaged in work in interstate transportation or so closely related thereto as to be a part thereof.

In its opinion in this case, the Court states as follows:

"From a reading of the opinion in the *Collins case*, it is apparent that the test of the *Shanks case* was not

followed (See p. 85). The words 'interstate commerce' being inadvertently substituted for the words 'interstate transportation.' "

Now we think that in the case at bar it is immaterial whether you apply the *"transportation" test or the "commerce"* test for the respondent, Thomas, was not, of course, actually engaged in the movement of traffic of any kind, but it is our theory that he was at the time engaged in caring for or operating an instrumentality essential to and so closely related to interstate transportation as to be a part thereof. What he was doing was operating or caring for a motor which furnished power for hoisting coal into a chute which for many years had been regularly and constantly used in applying coal to engines indiscriminately engaged in both inter and interstate transportation. This coal chute and its appliances were as necessary and essential to interstate transportation as were the tracks over which the engines in question operated, for without fuel the engines could not operate.

The *Collins* and *Szary cases* are not isolated cases in any sense but the rule laid down therein is one which beginning with *Pedersen* v. *Delaware, L. & W. R. Co.*, 229 U. S. 146, decided in 1913, has consistently been followed by this Court in numerous cases.

As will be noted in the *Collins case*, this Court cites and follows the *Pedersen case*. In that case (Pedersen) the plaintiff was an iron worker employed by the defendant in the alteration and repair of some of its bridges and tracks, and at the immediate time of the injury was engaged in carrying some bolts or rivets from a toolcar to a bridge which they were intending to repair, which said bridge was being regularly used in both inter and intrastate commerce as was the coal chute in the case at bar. This Court held that at the time of his injury, the plaintiff, Pedersen, was engaged in interstate commerce. This on the theory

that he was engaged in and about the repair of an instrumentality of interstate commerce. In the course of its opinion the Court after referring to the intention of the statute, continues as follows, page 151:

> "But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements, and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? * * *
>
> True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce."

In *New York Central R. Co.* v. *Porter*, 249 U. S. 168, 63 Law Ed. 536, plaintiff's intestate, a section man, was killed as the result of being struck by a train while he was engaged in shoveling snow from the railroad tracks which were used for both inter and intrastate commerce. In that case, as in the *Collins case*, this Court followed the *Pedersen case* and held that he was at the time engaged in interstate commerce.

In *Kinzell* v. *Chicago, M. & St. P. R. Co.*, 250 U. S. 130, 63 Law Ed. 893, the claimant was injured while engaged in filling with earth a wooden trestle work bridge over which the railroad tracks ran. This Court again followed the *Pederson case* and held that he was at the time engaged in work in interstate commerce.

The *Pedersen, Kinzell* and *Porter cases, supra,* are again cited and followed in the case of *So. Pac.* v. *Industrial Accident Commission,* 251 U. S. 259, which we cited on page 14 of our brief herein but did not quote from.

In that case the plaintiff an electric lineman, was injured while wiping insulators supporting a cable through which an electric current was carried to the motors and cars engaged in both intra and interstate commerce. In that case this Court held that the plaintiff was at the time in question engaged in interstate commerce, and in its opinion stated as follows page 263:

> "Power is no less essential than tracks or bridges to the movement of cars. The accident under consideration occurred while deceased was wiping insulators actually supporting a wire which then carried electric power so intimately connected with the propulsion of cars that if it had been short-circuited through his body, they would have stopped instantly. Applying the suggested test, we think these circumstances suffice to show that his work was directly and immediately connected with interstate transportation, and an essential part of it."

In none of the foregoing cases was the injured employee engaged in actual transportation at the time he was injured, but in each he was engaged in repairing, working on or operating some instrumentality which was closely connected with and essential to interstate transportation, and for that reason it was held in each of said cases that he was at the time engaged in interstate commerce.

In determining whether or not an instrumentality upon which an employee is working is or is not so closely related to transportation as to be a part thereof, it is we submit immaterial whether the "*transportation*" test or the "*commerce*" test is applied. The question simply is whether or not the instrumentality is essential to and so closely related to interstate transportation as to be a part thereof.

In this connection we call attention to the fact that in *So. Pac.* v. *Industrial Accident Commission,* 251 U. S. 259, *supra,* the Court in defining the test used the words "interstate transportation" while in the *Pedersen case* the Court used the words "interstate commerce," yet it reached the same conclusion in both cases.

As will be seen from the foregoing authorities, it is the character of the particular instrumentality upon which an employee is working which in this class of cases determines the question whether or not he is engaged in interstate transportation. If the instrumentality is one essential to and directly used in connection with interstate transportation as was the coal chute and motor in the case at bar, then, we submit, such employees are engaged in work so closely related to interstate transportation as to become a part thereof, and the case falls under the Federal Employers' Liability Act.

As above stated, beginning with the *Pedersen case* in 1913, the rule announced in the *Collins* and *Szary cases* has been consistently followed by this Court in numerous cases, and we believe that in discarding said rule and overruling said cases, this Court has overlooked the fact that in this particular class of cases it is the character of the instrumentality itself which controls and, therefore, has reached a wrong conclusion.

II.

The rule laid down in the Harrington Case, 241 U. S. 177, is not inconsistent with that laid down in the Collins and Szary cases.

In its opinion in this case, the Court states that it is unable to reconcile the decision in the *Harrington case* with the rule deducible from the *Collins* and *Szary cases.* Now while we discussed this particular question at length on the oral argument of this case, we beg to again suggest that we do not think that these decisions are inconsistent, or that adherence to the rule laid down in the *Harrington case* requires the overruling of the *Collins* and *Szary cases.*

In the *Collins* and *Szary cases,* as in the *Pedersen* and other cases cited *supra,* the injured employees were not engaged in train movements at all but were actually working on some instrumentality essential to and closely related to transportation. Whereas, in the *Harrington case,* the injured man was simply engaged in a switching movement. He was not caring for or operating a coal chute, or motor connected therewith, as was respondent in the case at bar, nor was he operating, caring for or working on any instrumentality but he was a switchman engaged in train work, and as to him, the question as to whether he was engaged in interstate commerce depends upon the particular kind of traffic he and his crew were handling at the time. An entirely different question would have been presented had he been actually working on some instrumentality as was respondent in the case at bar.

The *Collins* and *Szary cases* were decided by this Court subsequent to the time it decided the *Harrington case,* and in deciding those cases it had the *Harrington case* in mind for in the *Collins case* the *Harrington case* is referred to and discussed. The Court must have felt that the cases were distinguishable and that the rule announced in the

Harrington case was not applicable to the facts in the *Collins case.*

For the foregoing reasons, it is respectfully urged that the Court should grant a rehearing in this case, and that upon such rehearing the order affirming the judgment below should be vacated and that this case should be reversed upon the authority of *Erie R. R. Co.* v. *Collins,* 253 U. S. 97, and other similar cases.

EDWARD W. RAWLINS,
Counsel for Petitioner, Chicago & Eastern Illinois R. R. Co.

T. P. LITTLEPAGE,
Of Counsel.

CERTIFICATE OF COUNSEL.

I, Edward W. Rawlins, counsel for the above named Chicago & Eastern Illinois R. R. Co., petitioner herein, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

EDWARD W. RAWLINS,
Counsel for Petitioner, Chicago & Eastern Illinois R. R. Co.